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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 563

PARK L. HOFFMAN, SUBSTITUTED FOR R. G. HOLSING, RECEIVER OF FIRST NATIONAL BANK OF BOSWELL, PENNSYLVANIA, PETITIONER,

vs.

HENRY I. RAUCH, ADMINISTRATOR, EMILINE B. RAUCH, LATE OF JENNER TOWNSHIP, SOMERSET COUNTY, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1936.

CERTIORARI GRANTED JANUARY 11, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 7545. Law

HENRY I. RAUCH, Administrator; EMILINE B. RAUCH, Late of Jenner Township, Somerset County, Pennsylvania, Appellee,

vs.

PARK L. HOFFMAN, Substituted for R. G. HOLSING, Receiver of First National Bank, of Boswell, Pennsylvania, Appellant

DOCKET ENTRIES

May 26, 1933. Exemplification of Record from Common Pleas Court of Somerset County filed.

Sept. 20, 1933. Præcipe for issue filed.

Feb. 21, 1934. Trial opens before McVicar, J.

Feb. 21, 1934. Trial Closed.

Feb. 21, 1934. The Jury find a verdict in favor of the Plaintiff in the sum of $402.08 under binding instructions by the Court—Verdict filed.

[fol. 2] Feb. 21, 1934. Trial memo filed.

Mar. 20, 1934. Præcipe for judgment filed.

Mar. 20, 1934. Pursuant to above præcipe judgment is hereby entered on the verdict.

Mar. 21, 1934. On petition of Plaintiff order entered granting rule on R. G. Holsing, receiver to show cause why an order should not be entered directing said receiver to pay in full as preferred item the verdict and resulting judgment therefrom of $402.08 together with costs rule returnable first Monday in April, 1934.

Mar. 23, 1934. Acceptance of service of rule filed.

Mar. 23, 1934. Answer of R. G. Holsing, Receiver to rule filed.

Jan. 10, 1935. Opinion filed and entered directing that a decree be submitted in accordance with said opinion.

Jan. 17, 1935. Decree filed and entered directing that the judgment herein entered in the sum of $402.08 is founded on facts and circumstances having all the attributes of a

special deposit and as such special deposit is entitled to participate in the distribution of the assets of the First National Bank of Boswell, Exception to defendant granted.

Mar. 7, 1935. On petition of defendant, Order entered allowing appeal, no bond to be filed; Assignments of Error filed.

Mar. 7, 1935. Præcipe for printing record filed.

July 22, 1935. On motion of plaintiff order entered substituting name of Park L. Hoffman for R. G. Holsing, Receiver.

[fol. 3] July 22, 1935. Præcipe filed for appearance of Joseph Levy, attorney for plaintiff.

IN COURT OF COMMON PLEAS OF SOMERSET COUNTY, MAY TERM, 1933

No. 45

HENRY I. RAUCH, Administrator; EMILINE B. RAUCH, Late of Jenner Township, Somerset County, Pa.,

vs.

R. G. HOLSING, Receiver, First National Bank, Boswell, Pa.

DOCKET ENTRIES

Feb. 21, 1933. Summons in assumpsit issued, returnable second Monday in May, 1933.

Feb. 21, 1933. Plaintiff's statement filed.

Mar. 2, 1933. Sheriff returned summons served on defendant, with copy of plaintiff's statement.

Apr. 15, 1933. Petition filed to remove cause to U. S. District Court.

Apr. 15, 1933. Bond for removal approved and filed.

Apr. 15, 1933. On motion of plaintiff order entered that this court proceed no further in the action and that the cause be transferred to the U. S. District Court for the Western District of Pa.

Apr. 15, 1933. Præcipe filed to certify and transmit the cause to U. S. District Court.

Apr. 24, 1933. Affidavit of defense filed.

[fol. 4] IN COURT OF COMMON PLEAS OF SOMERSET COUNTY

[Title omitted]

PLAINTIFF'S STATEMENT OF CLAIM—Filed February 21, 1933

The Plaintiff, Henry I. Rauch, Administrator of Emiline B. Rauch, claims of the Defendant, R. C. Holsing, Receiver of the First National Bank of Boswell, the sum of Four Hundred Twenty-five and 44/100 ($425.44) Dollars, together with interest thereon from the 15th day of October, 1932 upon a Cause of Action, whereof the following is a statement:

First. The Plaintiff Henry I. Rauch, is the Administrator of Emiline B. Rauch, deceased, late of Jenner Township, Somerset County, Pennsylvania, who died June 2nd, 1932 and which estate is numbered 113 of the year 1932, in the Orphans Court of Somerset County, Pennsylvania.

Second. R. C. Holsing, is the Receiver duly appointed by the Comptroller of Currency of the United States of America, of the First National Bank of Boswell, a Corporation existing by virtue of the laws of the United States and [fol. 5] which Corporation was declared insolvent on the — day of January, 1932.

Third. That on the 9th day of April, 1929, all the assets, money, property, deposits, and Choses in Action of the People's State Bank of Boswell, a Pennsylvania Banking Corporation, were turned over to the First National Bank of Boswell. That the People's State Bank of Boswell ceased to function as a Banking Institution on that date and among other things the First National Bank of Boswell, became the liquidating agent of all the assets and property of the People's State Bank and took over the deposits and property held under Bailment Agreements. That the said merger and liquidation contract made by the two aforesaid Banks was duly approved by the Treasurer of the United States and the Secretary of Banking for the Commonwealth of Pennsylvania.

Fourth. That on the 10th day of February, 1922, Emiline B. Rauch, the above named decedent, left with the People's State Bank of Boswell, for "Safe Keeping Only" five Lib-

erty Bonds of the United States of America, each in the amount of One Hundred ($100.00) Dollars, and being of the series of 1933, and 1938, and which Bonds were numbered and marked as follows:

A 02183691
B 02183692
C 02183693
D 02183694
E 02183695

[fol. 6] which receipt is hereto attached and marked "Exhibit A."

Fifth. That on the 9th day of April, 1929, possession and custody of the five aforesaid Liberty Bonds was transferred by the People's State Bank of Boswell, to the First National Bank of Boswell, and thereafter Emiline B. Rauch, the above named decedent, called at the First National Bank of Boswell, and had the Cashier, P. M. Weimer, detach the interest coupons from the aforesaid bonds and cashed them at the aforesaid First National Bank. That on or about the 29th day of Sept., 1931, the interest coupons on the said Liberty Bonds were last detached from the Bonds and at which time the said Bonds were in the custody and possession of the First National Bank of Boswell, and which date was the last time that the said Emiline B. Rauch, or her proper representative ever saw the said Liberty Bonds, with the exception of Bond A 02183691, which was delivered to the decedent's administrator by the Receiver of the First National Bank on or about the 27th day of May, 1932.

Sixth. The Plaintiff believes and is informed and therefore avers that on or about the 15th day of December, 1931, the First National Bank of Boswell, through its Cashier, P. M. Weimer, converted to its own use and benefit four of the said Liberty Bonds, numbered and identified as follows:

B 02183692
C 02183693
D 02183694

[fol. 7]

E 02183695

and sold the same to Josiah D. Lohr of Jenner Cross-Roads, Somerset County, Pennsylvania, and received therefrom the

full face and market value of the said Liberty Bonds. That the said sale and conversion of the said Bonds was without the knowledge or the consent of the Plaintiff's decedent.

Seventh. Repeated demands have been made to the Receiver, for the return of the said Bonds or the value thereof at the date of conversion on or about the 15th day of December, 1931, but the said Receiver has neglected or refused to return the said Bonds or pay the value thereof.

Wherefore, this suit.

Henry I. Rauch, Administrator of Emiline B. Rauch, Dec'd.

(Sworn to by Henry I. Rauch.)

EXHIBIT "A" TO STATEMENT OF CLAIM

Received February 10th, 1922.

A 02183691
B 02183692
C 02183693
D 02183694
E 02183695

Emiline B. Rauch
For safe keeping only.

People's State Bank.
M. E. Wagner.
A. Casbeir.

[fol. 8] IN COURT OF COMMON PLEAS OF SOMERSET COUNTY

PETITION TO REMOVE CAUSE TO THE DISTRICT COURT OF THE UNITED STATES—Filed April 15, 1933

To the Honorable Norman T. Boose, President Judge of Said Court:

The petition of R. G. Holsing, Receiver of First National Bank of Boswell, Pennsylvania, respectfully represents:

First. The First National Bank of Boswell, Pennsylvania, was a banking association created and existing under the laws of the United States of America relating to National Banks, having its domicile and place of business in

the Borough of Boswell, County of Somerset, and State of Penna.

Second. On January 26th, 1932, the First National Bank of Boswell, Pennsylvania, was found and declared to be insolvent by the Comptroller of the Currency of the United States of America, whereupon the said bank was closed, and on the 9th day of February, 1932, the Comptroller of the Currency appointed your petitioner Receiver under the provisions of the laws of the United States relating to National Banks; the order appointing your petitioner such Receiver being recorded in Somerset County, Pa. in Deed Book volume 103, page 276, reference to which is hereby made for the purpose of showing the same, to the same effect as [fol. 9] though it had been fully set forth in this petition. Your petitioner has duly qualified as such Receiver and is now winding up the affairs of the said bank under the direction and control of the Comptroller of the Currency.

Third. That an action has been brought in your Honorable Court by the plaintiff above named against your petitioner, the defendant above named, to No. 45 May Term, 1933, of which action the District Court of the United States has jurisdiction.

Fourth. That the plaintiff is a citizen of the State of Pennsylvania and a resident of the Western District thereof, and was such at the time of the bringing of said action.

Fifth. Your petitioner further avers that by reason of the said matters herein averred, a controversy has arisen under the laws of the United States, and that your petitioner as Receiver is engaged in the business of winding up the affairs of a National Bank.

Sixth. Your petitioner represents that a summons in assumpsit in the above stated action was issued 21st February, 1933, and the said writ and a copy of the Plaintiff's Statement of Claim was served on R. G. Holsing, your petitioner, by the sheriff of Somerset County, March 1st, 1933, but that no affidavit of defense was filed to said claim for the reason that negotiations have been pending with the plaintiff, through his counsel, Leland W. Walker, with a view to having a claim filed with the Receiver, your peti- [fol. 10] tioner, for a partial dividend or payment on the

plaintiff's claim; that in pursuance of said negotiations and at the request of the said Leland W. Walker, your petitioner furnished said Leland W. Walker a form of proof or claim to submit on or about the 6th day of April, 1933; but that on the 10th day of April, 1933, the said Leland W. Walker advised C. L. Shaver, the attorney for your petitioner, that his client, the plaintiff above named, has refused to file said claim and desired now to proceed with the above stated action, for which reason your petitioner, the defendant, has not filed an affidavit of defense to the above action and no judgment has been taken for want thereof.

Seventh. Your petitioner represents that he desires to remove the said suit or action from your Honorable Court to the District Court of the United States in and for the Western District of Pennsylvania at Pittsburgh, Pennsylvania, and that for the reasons set forth in paragraph "Sixth" the time limit for such removal has not expired.

Eighth. Your petitioner further represents that he has executed and presents herewith for filing a bond with good and sufficient surety that your petitioner will enter in said District Court on the first day of its next session for paying all costs that may be awarded by the District Court if the said Court should hold that the said suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays your Honorable Court to accept this petition and bond and proceed no further in [fol. 11] such suit, and that an order be made to file the said suit in the District Court of the United States for the Western District of Penna.

R. G. Holsing, Receiver First National Bank of Boswell, Penna.

(Sworn to by R. G. Holsing.)

IN COURT OF COMMON PLEAS OF SOMERSET COUNTY

ORDER FOR REMOVAL

On the annexed petition of R. G. Holsing, Receiver of the First National Bank of Boswell, Pennsylvania, verified the 13th day of April, 1933, and upon all the papers and pro-

ceedings in the cause, and the said defendant having made and filed a bond with good and sufficient sureties as required by law, and having in all other respects complied with the statute in such case made and provided,

Now, 15th day of April, 1933, on motion of C. L. Shaver, attorney for the said petitioner, the defendant, it is ordered that this Court does hereby accept the said petition and bond, and that it proceed no further in this action, and that the cause be and hereby is transferred and removed to the District Court of the United States for the Western District of Pennsylvania as provided by law.

By the Court.

Norman T. Boose, P. J.

[fol. 12] In Court of Common Pleas of Somerset County

Præcipe to Certify Proceedings to U. S. Court—Filed April 15, 1933

To Walter E. McNutt, Esq., Prothonotary:

You are hereby notified that the above cause is one in which R. G. Holsing, Receiver First National Bank of Boswell, Pa. is a party, and that as such party is winding up the affairs of the said First National Bank of Boswell, Pennsylvania; and that all actions brought by or against him are strictly within the jurisdiction of the Federal Courts, in this instance the District Court of the United States for the Western District of Pennsylvania.

You will, therefore, certify and transmit the cause now pending before you to the District Court of the United States for the Western District of Pennsylvania.

C. L. Shaver, Attorney for R. G. Holsing, Receiver, First National Bank, Boswell, Pa.

In Court of Common Pleas of Somerset County

Affidavit of Defense—Filed April 24, 1933

Now, 24th day of April, 1933, comes R. G. Holsing, Receiver of the First National Bank of Boswell, Pennsylvania, and in answer to the plaintiff's statement of claim avers:

First. Admitted.

[fol. 13] Second. Admitted, with the further averment that the said First National Bank of Boswell, Pennsylvania, was found and declared by the Comptroller of the Currency to be insolvent on the 26th day of January, 1932.

Third. The averments in the third paragraph of the plaintiff's statement are admitted in so far as there was a contract to take over the assets of the Peoples State Bank of Boswell, Pa., by the First National Bank of Boswell, Pennsylvania; but all legal conclusions as to the effect of the said contract and as to whether or not the same constituted the First National Bank of Boswell, Pa. liquidating agent or whether a merger of the said institutions occurred is deemed to be irrelevant and immaterial, a copy of the said agreement is marked defendant's Exhibit 1, hereto attached and made a part of this Affidavit of Defense as setting forth the actual terms thereof.

Fourth. Admitted, save that the duplicate of the receipt held by Emiline B. Rauch as furnished this defendant by Leland W. Walker, Attorney for the plaintiff, bears date of July 10, 1932, instead of 10th day of February, 1922.

Fifth. This defendant has no knowledge of the specific facts averred in paragraph five of the plaintiff's statement, and believes the same to be substantially correct as therein averred.

Sixth. The facts as set forth in paragraph 6th of the plaintiff's statement of claim as therein averred are denied, and as this defendant avers the true facts with rela- [fol. 14] tion thereto are as follows: on the 21st day of January, 1932, P. M. Weimer, who was then the Cashier of the First National Bank of Boswell, Pa. sold the four bonds specifically mentioned in the sixth paragraph of the plaintiff's statement to Josiah or Rose Lohr, customers and depositors of the First National Bank of Boswell, and from said date charged their said account with the sum of $400.24 as the purchase price of the said bonds; and on the 22nd day of January, 1932, the said P. M. Weimer, drew a Cashier's check on the First National Bank of Boswell, Pa. payable to the order of Post & Flagg, Brokers, in the sum of $402.08 for the purchase of four Liberty Bonds of the par value of $100.00 each in lieu of and substitution for the bonds alleged to be those of Emiline B. Rauch, sold

by the said P. M. Weimer unto Josiah or Rose Lohr; and that before the said check was presented for payment the First National Bank of Boswell, Pa. was found and declared to be insolvent and payment of the said check was prevented thereby.

Seventh. It is admitted that Leland W. Walker, as attorney for the plaintiff, has made demand for the return of the said bonds upon the Receiver of the First National Bank of Boswell, Pa., but this defendant avers that it has been unable to return the said bonds for the reasons herein averred inasmuch as the check remitted to Post and Flagg for the purchase of the bonds in lieu of and in substitution for those so delivered by the said P. M. Weimer, as aforesaid, has never been paid for the reason that it was not presented to the First National Bank of Boswell, Pa. until [fol. 15] the said bank was found and declared to be insolvent and payment thereof thus prevented by reason of such insolvency but this defendant avers that he has at all times agreed to and offered to pay unto the plaintiff a dividend such as has been declared and awarded to general depositors on the sum of $402.02, that being the amount of the check aforesaid and the liability, if any, of this bank to the plaintiff as of the date of its insolvency, to-wit: January 26th, 1932.

Eighth. For further answer to the plaintiff's statement, this defendant avers that as he is advised and believes the liability of the First National Bank of Boswell, Pa., if any, upon the facts averred in the plaintiff's statement was fixed and determined as of the date of its insolvency, to-wit: January 26th, 1932; and that the said bank is now in the hands of this defendant for the purpose of winding up the affairs thereof in accordance with the laws of the United States governing insolvent banks, and that the plaintiff is not entitled to payment or compensation on the sum of $425.44, but only on the sum of $402.08, that being the actual market value of the bonds of the plaintiff's intestate, Emiline B. Rauch, as of the date of the sale and alleged conversion thereof, and the First National Bank of Boswell, Pa. being insolvent, interest on said amount cannot be allowed.

Ninth. This defendant further avers that under the terms of the said agreement for safekeeping as averred in

paragraph four of the plaintiff's statement of claim, the [fol. 16] acts of the said Park M. Weimer were unauthorized and ultra vires, and that the First National Bank of Boswell, Pa., is not liable unto the plaintiff in any sum whatsoever by reason of the fact that the said Park M. Weimer was acting outside of the scope of his employment as said Cashier and outside of the terms of the said alleged agreement or contract by which the said bank became a bailee of the said bonds for safekeeping only, and further avers that no action was ever taken by the Board of Directors of said bank at any time authorizing said action upon the part of the said Park M. Weimer, nor have the Board of Directors at any time subsequent thereto, nor has this defendant as Receiver thereof, done any act, matter or thing in ratification of the acts of the said Park M. Weimer,

All of which facts this defendant avers he shall be able to maintain upon the trial of this cause.

R. G. Holsing, Receiver First National Bank, Boswell, Pa.

(Sworn to by R. G. Holsing.)

EXHIBIT 1 TO AFFIDAVIT OF DEFENSE

Copy of the Agreement Between the First National Bank of Boswell and the Peoples State Bank, Boswell, Pennsylvania

This agreement made and concluded this ninth day of April, 1929 by and between The Peoples State Bank of Boswell, Penna., a corporation organized and existing under the laws of the state of Pennsylvania and having its [fol. 17] principal place of business in the borough of Boswell, County of Somerset, state of Penna., party of the first part, and,

The First National Bank of Boswell, Pennsylvania, an association organized and existing under the Banking Laws of the United States, and having its principal place of business in the borough, county and the state aforesaid, herein after called party of second part.

Witnesseth, that the parties hereto, for and in consideration of the mutual covenants and promises herein contained, do hereby agree as follows:—

First. The party of the first part hereby grants bargains, sells, assigns, transfers and sets-over unto the party of the second part, all of its property and assets of every kind, character and description, real, personal and mixed, as owned and possessed by it, at the close of its business on April the Ninth, 1929, and including all of its cash, currency, gold, silver, specie, notes, whether promissory, judgment or collateral, together with any and all collateral securing said notes, trade acceptances, accounts receivable, choses in action, stocks, bonds, judgments and mortgages, together with the bonds thereby secured, as well as all stockholders' liability under the laws of the State of Penna. Complete schedules of said property and assets shall forthwith be made, which schedules shall contain a sufficient description of each item of property to reasonably identify it, and shall be authenticated by the signatures of the parties hereto and their respective seals, and shall thereupon be attached hereto, and be and become a part hereof. The party of the first part shall, at the close of its business in April the ninth, 1929 deliver to the party of the second part full and complete possession of all its property and [fol. 18] assets, together with such books, records and papers as pertain thereto and which may be required by the party of the second part in the collection thereof. The party of the first part shall, from time to time, on request of the party of the second part, make, execute and deliver such deeds, assignments, transfers and assurances as may be required to legally vest title to said property and assets in the party of the second part.

Second. In consideration whereof, the party of the second part hereby assumes and agrees to pay and discharge all of the liabilities and obligations of the party of the first part, other than the liability to its stockholders as such, existing at the close of its business on April the ninth, 1929, and as shown by its books and records, which liabilities and obligations shall be paid and discharged in the manner and at the time payment and discharge thereof may be legally required, but the party of the second part may anticipate payment thereof. In determining the liability of party of the first part, to its depositors, interest shall be calculated

thereon to April 9th, 1929, at the rate agreed upon by the party of the first part and such depositors. The party of the first part shall, at the close of business on April the ninth, 1929, deliver to the party of the second part full and complete possession of all individual ledgers, and such other books, records and papers as the party of the first part may have in connection with the accounts between it and each of its depositors.

Third. The party of the second part shall credit on its books, as a liability to its depositors, the amount payable by the party of the first part to its depositors, as shown by its books and records. The party of the second part shall open on its books another account to be designated "Peoples [fol. 19] State Bank Asset Account" or some other appropriate name, in which it shall charge as an asset all of the property received from the party of the first part, at an amount equal to the liability assumed. In addition thereto, the party of the second part shall open another account to be designated "Peoples State Bank Administration Account", against which shall be charged all sums paid by the party of the second part in behalf of the party of the first part, including expenses, not credited as hereinbefore provided, as a liability to the depositors of the party of the first part.

Fourth. The party of the second part shall, from time to time, absorb and liquidate the property and assets of the party of the first part, and shall credit to the asset account all sums realized by absorption and liquidation. The property and assets of the party of the first part shall be kept separate and distinct until absorbed or liquidated, and all interest and income produced and yielded thereby shall be credited to an account to be designated "Peoples State Bank Income Account". This account shall be closed at such convenient time as the party of the second part may fix, by charging the amount thereof against the asset account.

Fifth. The party of the second part shall, within the period of three (3) years, absorb and liquidate all of the property and assets of the party of the first part, or a sufficient amount thereof to equal the obligations and liabilities hereby assumed, including the expenses of liquidation, but the time for such absorption and liquidation m-y be ex-

tended by the party of the second part with the consent of the Comptroller of the Currency and the Secretary of Banking of the State of Pennsylvania. If at any time, during the said period of three years, or any extension thereof, the [fol. 20] absorption and liquidation shall have been so far completed that the whole liability of the party of the first part to the party of the second part is discharged, or if the party of the first part shall pay and discharge such part thereof as may at any time during such period remain unpaid and subsisting, the party of the second part shall grant, bargain, sell, assign, transfer and set-over to the party of the first part, or to liquidation Trustees which may be appointed, all of the remaining unabsorbed and unliquidated property and assets of the party of the first part.

Sixth. The party of the second part shall charge to the party of the first part in the administration account hereinbefore mentioned, all expenses incurred in the administering of the property and assets of the party of the first part, including the salaries of such employees as may be necessary for that purpose. The party of the second part may, for the protection of said property and assets, purchase property at judicial or other sale, which, when so purchased, shall be and become a part of the unliquidated assets of the party of the first part, and the party of the second part may compound, compromise and adjust the claims in the exercise of its sound discretion, but no such action shall be taken without conference and consultation with the liquidation trustees of the party *of the party* of the first part. The party of the second part shall not sell or dispose of any property or compromise and claim for a sum less than the liquidating trustees are willing to pay.

Seventh. If at anytime within three years, any asset shall be determined as a loss the right is reserved to substitute such assets for cash or good assets from any collateral that was taken from the party of the first part. The party of the second part shall have the right to renew a [fol. 21] note at anytime it sees fit without affecting it's right of recourse on substitution.

Eighth. The party of the first part will not again engage in business without the consent of the party of the second part, and in order to effectuate the assignment of the stockholders liability under the law of the State of Pennsylvania

hereinbefore made and to better enable the party of the second part to enforce such liability, the corporate existence of the party of the first part shall be continued until the absorption and liquidation of its assets is completed, and the liability of the stockholders may be enforced for the payment and collection of any deficit that may result from the absorption and liquidation of such assets. To better evidence this liability, the party of the first part will execute, pursuant to resolution of its Board of Directors, duly adopted, a note payable to the party of the second part in thirty (30) days after demand, in the sum of Thirty Thousand ($30,000.00) dollars, which note shall be authenticated by the signatures of the President and Cashier of the party of the first part and its corporate seal.

Ninth. The party of the first part will forthwith elect three of the members of its Board of Directors as liquidation trustees, to represent the party of the first part as hereinbefore stated, and which trustees shall have such duties and powers in connection with the absorption and liquidation of the property and assets of the party of the first part as may have been conferred upon them by its Board of Directors.

Tenth. This agreement was read at length, duly passed and adopted at a meeting of the Board of Directors of the [fol. 22] Peoples State Bank of Boswell, Penna. duly and regularly called and held on April the ninth, 1929, and by resolution regularly adopted, the President and Cashier were authorized empowered and directed to execute the same, for and on behalf of the said bank.

The Board of Directors of the first part- by a resolution regularly adopted on April the ninth, 1929 has called a special meeting of its stockholders for the purpose of ratifying and approving this agreement and in the event the stockholders shall fail to ratify and approve the same, the party of the second part shall return to the party of the first part all of the property and assets set forth in the schedules to be hereto attached, or in the event any of said assets have been collected or sold, the equivalent thereof, excepting however a sufficient amount of said assets to be selected by the party of second part, to cover any deposit obligations of the party of the first part already paid and discharged by the party of the second part. The party of the second

part shall also return all records, books and papers delivered to it by the party of the first part, and this agreement shall, thereupon, be and become null and void.

Eleventh. This agreement was read at length, duly passed and adopted at a meeting of the Board of Directors of the First National Bank of Boswell, Penna., duly and regularly called and held on the ninth of April, 1929 and by resolution regularly adopted, the President and Secretary were authorized, empowered and directed to execute the same for and on behalf of the said bank.

Twelfth. This agreement shall extend to and bind the successors and assigns of the parties hereto.

[fol. 23] In Witness Whereof, the parties hereto have caused these presents to be signed in their respective corporate names by their Presidents, their corporate seals to be hereunto affixed, attested by the Cashiers of the said banks, all the day and year first above written.

Peoples State Bank of Boswell, Pa., by Ferdinand Sann, President. (Corporate Seal.)

Attest: Robt. Bittner, Cashier.

First National Bank of Boswell, Pa., by R. W. Lohr, President. (Corporate Seal.)

Attest: P. M. Weimer, Cashier.

[fol. 24] In United States District Court

[Title omitted]

Statement of Evidence

And now, Tuesday, February 20, 1934, the above entitled matter came on for trial before Hon. Nelson McVicar, Judge, and a Jury, at Pittsburgh, Pennsylvania.

Counsel Present:

For Plaintiff: Leland W. Walker, Esq.
For Defendant: C. L. Shaver, Esq.

Harriet Cole Thomas, Official Reporter, by Eva McBride.

(Jury sworn.)

Mr. Walker: I now offer the first paragraph of the plaintiff's Statement of Claim, together with the corresponding paragraph of the Affidavit of Defense:

[fol. 25] "1. (Statement of Claim.) The Plaintiff, Henry I. Rauch, is the Administrator of Emiline B. Rauch, deceased, late of Jenner Township, Somerset County, Pennsylvania, who died June 2nd, 1932, and which estate is numbered to No. 113 of the year 1932, in the Orphans Court of Somerset Co., Pennsylvania."

"1. (Affidavit of Defense.) Admitted."

I now offer the second paragraph of plaintiff's Statement of Claim, together with the corresponding paragraph of the Affidavit of Defense, it being understood that the 26th day of January, 1932, was the date that the Comptroller of Currency declared this defendant Bank insolvent:

"2. (Statement of Claim.) R. G. Holsing is the Receiver duly appointed by the Comptroller of Currency of the United States, of the First National Bank of Boswell, a corporation existing by virtue of the laws of the United States and which corporation was declared insolvent on the — day of January, 1932."

"2. (Affidavit of Defense.) Admitted, with the further averment that the said First National Bank of Boswell, Pennsylvania, was found and declared by the Comptroller of the Currency to be insolvent on the 26th day of January, 1932."

I now offer the third paragraph of plaintiff's Statement of Claim, together with the corresponding paragraph of the Affidavit of Defense, admitting the averments in the Plaintiff's Statement:

[fol. 26] "3. (Statement of Claim.) That on the 9th day of April, 1929, all the assets, money, property, deposits, and choses in action of the People's State Bank of Boswell, a Pennsylvania Banking Corporation, were turned over to the First National Bank of Boswell. That the People's State Bank of Boswell ceased to function as a banking institution on that date and among other things the First National Bank of Boswell became the liquidating agent of

all the assets and property of the People's State Bank and took over the deposits and property held under bailment agreements. That the said merger and liquidation contract made by the two aforesaid Banks were duly approved by the Treasurer of the United States and the Secretary of Banking for the Commonwealth of Pennsylvania."

"3. (Affidavit of Defense.) The averments in the third paragraph of the plaintiff's statement are admitted in so far as there was a contract to take over the assets of the People's State Bank of Boswell, Pa. by the First National Bank of Boswell, Pennsylvania; but all legal conclusions as to the effect of the said contract and as to whether or not the same constituted the First National Bank of Boswell, Pa., liquidating agent or whether a merger of the said institutions occurred is deemed to be irrelevant and immaterial, a copy of the said agreement is marked defendant's Exhibit 1, hereto attached and made a part of this Affidavit of Defense as setting forth the actual terms thereof."

Mr. Shaver: Well, there is an admission of the facts as to [fol. 27] the relevancy. The objection was made as immaterial, and for the purpose of the record this goes in.

Mr. Walker: I now offer the fourth paragraph of the plaintiff's Statement of Claim, together with the corresponding paragraph of the Affidavit of Defense:

"4. (Statement of Claim.) That on the 10th day of February, 1922, Emiline B. Rauch, the above named decedent, left with the People's State Bank of Boswell, for 'Safe Keeping Only' five Liberty Bonds of the United States of America, each in the amount of One Hundred (100.00) Dollars, and being of the series of 1933, and 1938, and which bonds are numbered and marked as follows: A 02183691, B 02183692, C 02183693, D 02183694, and E 02-183695, which receipt is hereto attached and marked 'Exhibit A'."

"4. (Affidavit of Defense.) Admitted, save that the duplicate of the receipt held by Emiline B. Rauch as furnished this defendant by Leland W. Walker, Attorney for the plaintiff, bears date of July 10, 1922, instead of the 10th day of February, 1922."

I now offer the fifth paragraph of plaintiff's Statement of Claim, together with the corresponding paragraph of the Affidavit of Defense:

"5. (Statement of Claim). That on the 9th day of April, 1929, possession and custody of the five aforesaid Liberty Bonds was transferred by the People's State Bank of Bos- [fol. 28] well, to the First National Bank of Boswell, and thereafter Emiline B. Rauch, the above name- decedent, called at the First National Bank of Boswell, and had the Cashier, P. M. Weimer, detach the interest coupons from the aforesaid bonds and cashed them at the aforesaid First National Bank. That on or about the 29th day of Sept. 1931, the interest coupons on the said Liberty Bonds were last detached from the bonds and at which time the said bonds were in the custody and possession of the First National Bank of Boswell, and which date was the last time that the said Emiline B. Rauch, or her proper representative, ever saw the the said Liberty Bonds, with the exception of Bond A 02183691, which was delivered to the decedent's Administrator by the Receiver of the First National Bank on or about the 27th day of May, 1932."

"5. (Affidavit of Defense). This defendant has no knowledge of the specific facts averred in paragraph five of the Plaintiff's Statement, and believes the same to be substantially correct as therein averred."

Mr. Shaver: No objection.

Mr. Walker: I now offer the sixth paragraph of plaintiff's Statement of Claim, together with the corresponding paragraph of Affidavit of Defense:

"6. (Statement of Claim). The Plaintiff believes and is informed and therefore avers that on or about the 15th [fol. 29] day of December, 1931, the First National Bank of Boswell, through its Cashier, P. M. Weimer, converted to its own use and benefit four of the said Liberty Bonds, numbered and identified as follows: B 02183692, C 02183693, D 02183694 and E 02183695, and sold the same to Josiah D. Lohr, of Jenner Cross-Roads, Somerset County, Pennsylvania, and received therefrom the full face and market value of the said Liberty Bonds. That the said sale and conversion of the said bonds was without the knowledge or the consent of the Plaintiff's decedent."

Mr. Shaver: Just a moment. Those offers will not place an admitted fact upon the record, because the facts as pleaded in the sixth paragraph of the Statement of Claim are denied by the Affidavit of Defense. "On the 21st day of January, 1932, P. M. Weimer, who was then the Cashier of the First National Bank of Boswell, Pa., sold the four bonds specifically mentioned in the sixth paragraph of the plaintiff's Statement"—without the knowledge or consent of the plaintiff's intestate—"to Josiah or Rose Lohr"—husband and wife who were—"customers and depositors of the First National Bank of Boswell, Pa., and on said date charged their said account with the sum of $400.24 as the purchase price of the said bonds"—so sold to them, and that the said sale and conversion of the said bonds was without the knowledge or consent of the plaintiff's decedent —"and on the 22nd day of January, 1932, the said P. M. Weimer"—as Cashier—"drew a Cashier's check on the First National Bank of Boswell, Pa. payable to the order [fol. 30] of Post & Flagg, Brokers, in the sum of $402.08 for the purchase of four Liberty Bonds of the par value of $100.00 each in lieu of and substitution for the bonds alleged to be those of Emiline B. Rauch, sold by the said P. M. Weimer unto Josiah or Rose Lohr; and that before the said check was presented for payment the First National Bank of Boswell, Pa. was found and declared to be insolvent and payment of the said check was prevented thereby."

ADMISSIONS

Mr. Walker: 7. It is admitted that Leland W. Walker, Attorney for the plaintiff, has made demand for the return of the said bonds upon R. G. Holsing, Receiver of the First National Bank of Boswell, Pa., and that the same have not been returned by reason of their prior sale by the said P. M. Weimer when Cashier of the First National Bank of Boswell, Pa., and for the reason that the check remitted to Post & Flagg for the purchase of bonds in lieu of and in substitution for those delivered by P. M. Weimer aforesaid, has never been paid, as it was not presented to the First National Bank of Boswell, Pa., on which it was drawn, until the said Bank was found and declared to be insolvent, and payment thereof thus prevented by reason of such insolvency.

It is agreed that the defendant has at all times agreed and offered to pay unto the plaintiff a dividend such as has been declared and awarded to general depositors on the said sum of $402.08, and that the claimant has refused to accept the said offer of a dividend, claiming the relation of bailer [fol. 31] or bailee existed between the First National Bank and his decedent and therefore entitled to the bail bond or the full value thereof.

8. It is agreed, for the purpose of this case that the market value of the bonds sold and converted by the said P. M. Weimer on the 26th day of January, 1932, was the sum of $402.08.

MOTION FOR DIRECTED VERDICT

Mr. Walker: Counsel for plaintiff moves the Court to direct this jury to find a verdict in favor of the plaintiff in the sum of $402.08, as of the date of insolvency.

(Argument of counsel).

INSTRUCTION OF THE COURT

(McVicar, J.)

Gentlemen of the Jury:

The parties in this case have stipulated the facts, or else the facts are not denied under the pleadings, so that the question involved in this case becomes one of law rather than fact. The burden is upon the Court to determine that question of law. I have decided that the question of law shall be decided in favor of the plaintiff, and therefore I am instructing you now to render a verdict in favor of the plaintiff in the sum of $402.08. That relieves you from any responsibility in the case, excepting now that the Foreman should sign the verdict form.

[fol. 32] Reporter's certificate to foregoing transcript omitted in printing.

IN UNITED STATES DISTRICT COURT

JUDGE'S CERTIFICATE

I, Nelson McVicar, Judge of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the foregoing is a true transcript of all the evidence, offers of counsel, objections thereto, rulings thereon and exceptions thereto, and the Instruction of the Court, in the case of Henry I. Rauch, Administrator, Emiline B. Rauch, late of Jenner Township, Somerset County, Pennsylvania, vs. R. G. Holsing, Receiver of First National Bank, of Boswell, Pennsylvania, at No. 7545 Law; all of which, so certified, is ordered to be filed and to become a part of the record this 14 day of March, 1935, at Piftsburgh, Pennsylvania.

N. McVicar, Trial Judge.

[fol. 33] IN UNITED STATES DISTRICT COURT

VERDICT—Filed February 20, 1934

And now, to wit: Feb. 20, 1934, we, the Jurors empaneled in the above-entitled case, find—a verdict for the plaintiff in the sum of $402.08 under binding instructions by the court.

M. M. Weirich, Foreman.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR JUDGMENT—Filed March 20, 1934

To J. Wood Clark, Esquire, Clerk:

SIR:

Kindly enter judgment on the verdict in the above entitled case.

Leland W. Walker, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

JUDGMENT

March 20, 1934, pursuant to above præcipe, judgment is hereby entered on the verdict.

IN UNITED STATES DISTRICT COURT

MOTION FOR RULE—Filed March 21, 1934

To the Honorable the Judges of said Court:

Now, March 21st, 1934, comes Leland W. Walker, attorney for Henry I. Rauch, Administrator, and respectfully represents:

[fol. 34] First. That the above proceedings were originally instituted in the Common Pleas Court of Somerset County and entered at No. 45 May Term, 1933 in said Court. Thereafter the said proceedings, for cause shown, were removed from the Common Pleas Court of Somerset County to the District Court of the United States at Pittsburgh; and thereafter on the 20th day of February, 1934, the said issue was tried before the Honorable Nelson McVicar Judge, and the jury, empaneled in said proceedings at the direction of Judge McVicar, directed the jury to return a verdict in favor of the plaintiff in the sum of Four Hundred Two and 08/100 ($402.08) Dollars, and which verdict has been duly entered in the records of your Honorable Court and reduced to judgment.

Second. Frequent demands have been made for the payment of the aforesaid judgment of Four Hundred Two and 08/100 ($402.08) Dollars, together with costs, but the defendant, R. G. Holsing, Receiver of the First National Bank of Boswell, Pennsylvania refuses to pay the whole thereof, but offers the Plaintiff the position of an unsecured creditor and the plaintiff refuses the said offer for the reason that the relation of debtor and creditor did not exist between his decedent and the First National Bank of Boswell, but alleges and says that the judgment obtained in these proceedings was ob*ob*tained on the allegations of bailor and

bailee, and an unlawful conversion by the bank of the decedent's liberty bonds, and demands payment in full, thereof.

Wherefore, the Plaintiff, through his attorney, Leland W. Walker, respectfully moves your Honorable Court to award [fol. 35] a rule upon R. G. Holsing, Receiver of the First National Bank of Boswell, to show cause why the said judgment should not be paid in full,

Respectfully moved, Leland W. Walker, Attorney for Henry I. Rauch, Administrator.

(Sworn to by Leland W. Walker.)

IN UNITED STATES DISTRICT COURT

ORDER GRANTING RULE

Now, March 21st 1934, on motion of Allen S. Christner, associated with Leland W. Walker, Attorney for Henry Rauch, Administrator, plaintiff in the foregoing proceedings, a Rule is awarded on R. G. Holsing, Receiver of the First National Bank of Boswell, to show cause why an order should not be entered directing the said Receiver to pay in full as a preferred item the verdict and resulting judgment therefrom of Four Hundred Two and 08/100 ($402.08) dollars, together with costs. Returnable 1st Monday of April, 1934.

By the Court, V.

IN UNITED STATES DISTRICT COURT

ANSWER TO RULE—Filed March 24, 1934

To the Honorable the Judges of said Court:

Now, March 22nd, 1934, comes R. G. Holsing, Receiver [fol. 36] above named, and in answer to the rule awarded by your Honorable Court 21st March, 1934, answering the averments of the petition says:

First. All of the averments in paragraph "First" are admitted, save the averment that the said verdict entered by the jury has been reduced to judgment of which fact this

respondent has never been advised and of which he has never had notice.

Second. The allegations of the "Second" paragraph are denied as therein averred. It is admitted that a demand was made of this respondent for the payment of a sum in excess of $402.08 which was refused for the reason that the said sum was in excess of the amount this respondent verily believes was the claim to which the plaintiff was entitled. It is true that this respondent has at all times been willing to concede and admit that the plaintiff is a common and unsecured creditor of the First National Bank of Boswell, Pa., now in the hands of your respondent as Receiver thereof, and entitled to a proper pro rata and proportionate dividend with other creditors of a like class of the assets of the said bank when and as the same are declared by the Comptroller of the Currency. It is denied that judgment was obtained on representations of the relationship of bailor and bailee and an unlawful conversion by the First National Bank of Boswell, Pa. of Liberty Bonds; and to the contrary, it is averred that upon certain admitted facts placed upon the record at the trial of the above cause in the District Court of the United States for the Western District of Pennsylvania, the Court directed the jury to return a verdict in favor of the plaintiff, but it is submitted that in none of said facts agreed upon or placed upon the record in accordance with the pleadings, was there any averment [fol. 37] or statement of the fact or law that the relationship between the plaintiff and the defendent as above named, now petitioner and respondent respectively, was that of bailor and bailee.

Third. For other and further answer, your petitioner avers that upon the facts stated upon the record, the District Court of the United States for the Western District of Pennsylvania, to No. 7545 Law, it conclusively appears that the general balance or assets of the First National Bank of Boswell, Pa. were neither increased nor diminished by reason of the transaction out of which the claim of the plaintiff arose, and that as a result thereof, the present petitioner is not entitled to have and receive a proportionate or distributive share or dividend of the assets of the said bank in full or in preference to those of the general creditors thereof; that upon the facts introduced before the

jury, upon which the Court directed a verdict to be rendered, the essential requirement that thereby an augmentation of the assets of the said bank arose or was created, is wholly lacking; and your Honorable Court cannot by this proceeding specifically decree and determine that the plaintiff is entitled to a preference over and above the general creditors of the said bank now in the hands of your respondent as Receiver.

Fourth. This respondent further avers that as he is advised by counsel and believes, your Honorable Court is without jurisdiction to proceed to enter any judgment, order or decree fixing the status of the present petitioner, plaintiff in the action entered to No. 7545 Law in this Court, as your Honorable Court has already after a full trial before a Court and Jury adjudicated the rights of plaintiff in the matter and a verdict has been rendered by a jury under the direction of the Court; and your respondent avers that any [fol. 38] proceedings in the nature of an order or decree based on such verdict, to make distribution of the assets of your respondent's trust—the First National Bank of Boswell, Pa., now insolvent—would be an attempt to take jurisdiction of an entirely independent and separate matter and to attempt to still further determine in the same action docketed to the same number in law, a matter now finally determined and concluded by your Honorable Court.

Fifth. This respondent further avers in answer to said petition that as he is advised by counsel and believes, even though an augmentation of the general assets of the bank had been shown, it becomes incumbent upon the claimant who desires or seeks to have his claim determined to be a preference and payable in full, to be able to trace the funds so augmenting the assets of the bank into a specific fund, or to trace the identical property, if unconverted, into the possession of the Receiver; and that it becomes the duty of the Court to make a decree in such case specifying particularly the assets to which such equitable lien attaches, and there are no facts before your Honorable Court in this proceeding, being the action in law docketed to the above number, upon which your Honorable Court could base such finding and make any such order or decree.

Sixth. Respondent further avers that as he is advised by counsel and believes, there is no jurisdiction in your Honor-

able Court to make an order and decree in conformity with the prayer of the petition as the power to order payment of a preferred claim has been placed entirely within the control of the Comptroller of the Currency by the Act of Congress providing therefor, and there is no Act of Congress or authority placing any power in the Courts to order the [fol. 39] payment of a preferred claim against an insolvent bank in the hands of a Receiver.

Seventh. This respondent further avers that as he is advised by counsel and believes, the averments in the petition are insufficient in form and in substance to confer jurisdiction upon your Honorable Court to make the decree prayed for therein.

Wherefore, the respondent respectfully prays that the rule may be dismissed at the cost of the petitioner.

And he will ever pray, etc.

R. G. Holsing, Receiver First National Bank of Boswell, Pa.

(Sworn to by R. G. Holsing.)

IN UNITED STATES DISTRICT COURT

OPINION—Filed January 10, 1935

McVICAR, J.:

Emiline B. Rauch, on the 21st day of January, 1932, had a special deposit in the First National Bank of Boswell, of four liberty bonds owned by her. On said date the bank, acting by its Cashier, sold said bonds to another customer of the bank without the knowledge or authority of Emiline B. Rauch, and on the same day delivered said bonds to said customer and received payment therefor. On the 26th day of Janu ry 1932, the said bank was declared by the Comptroller of the Currency to be insolvent and closed, and a [fol. 40] Receiver was appointed. Before the closing of the bank, the bank, by its Cashier, endeavored to purchase four liberty bonds of the same character and amount for Mrs. Rauch and had issued its check in payment of said bonds but the bank closed before said check was paid and said bonds were not delivered. Mrs. Rauch afterwards died and an action at law was brought to recover the value of said bonds against the Receiver of the bank which resulted in a

verdict in favor of the plaintiff in the sum of $402.08, upon which judgment was entered. Plaintiff since filed a motion in this Court wherein he prayed that an order be made directing the defendant to pay the amount of said judgment to him. A rule was granted and at the hearing of the rule the parties, acting through their attorneys, agreed that the facts were substantially as stated above and that this case might be disposed of upon the pleadings now before the Court.

Plaintiff claims that he is a preferred creditor. Defendant denies this averment and claims that there was no augmentation of the assets of the defendant bank by the transaction aforesaid.

I am of the opinion that the deposit aforesaid was a special deposit; that the assets of the bank were augmented when the bank received from its customer the price agreed upon for said bonds and, therefore, that the plaintiff is entitled to participate in the distribution of the assets of the defendant bank as a preferred creditor. I also am of the opinion that the plaintiff is not entitled to have an order made directing payment of the amount of the judgment aforesaid to him.

[fol. 41] Let an order or decree be prepared and submitted in accordance with this opinion.

IN UNITED STATES DISTRICT COURT

DECREE—Filed January 17, 1935

Now, January 17, 1935, it is hereby Ordered, Adjudged and Decreed that the judgment recovered in this Court in these proceedings, wherein the Administrators of Emiline Rauch are plaintiffs and the Receiver of the First National Bank is defendant in the amount of Four Hundred Two and 08/100 — ($402.08) is founded on facts and circumstances, having all the attributes of a special deposit and as such special deposit is entitled to participate in the distribution of the assets by the Receiver of the First National Bank of Boswell as a preferred creditor.

By the Court.

Exception to defendant granted.

N. McVicar, D. J.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed May 7, 1935

To the Honorable the Judges of Said Court:

R. G. Holsing, Receiver of the First National Bank of Boswell, Pennsylvania, defendant in the above styled cause, believing himself aggrieved by the decree entered on the [fol. 42] 17th day of January, 1935 in the above styled cause, does hereby appeal therefrom to the Circuit Court of Appeals for the Third Circuit for the reasons specified in the Assignments of Error which shall be filed herewith; and he prays that this Appeal may be allowed and that a citation be issued directed to the said Henry I. Rauch, Administrator of Emiline B. Rauch, plaintiff, commanding him to appear before the Circuit Court of Appeals for the Third Circuit, to do and receive what may appertain to justice to be done in the premises; that a transcript of the record, proceedings and papers upon which said decree was made by duly authenticated and sent to the Circuit Court of Appeals for the Third Circuit, and that a proper order relating to the security required of him to perfect his appeal may be made.

R. G. Holsing, Receiver of the First National Bank of Boswell, Pa., by Clarence L. Shaver, His Solicitor.

(Sworn to by Clarence L. Shaver.)

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Now, 7th day of March, 1935, appeal allowed; and it is ordered that a citation be issued admonishing the plaintiff to be and appear in the United States Circuit Court of Appeals for the Third Circuit, on or before thirty days from this date. No bond will be required—Pacific Bank vs. Mixler 114 U. S. 463; Schell vs. Cochran, 107 U. S. 625-628.

By the Court.

N. McVicar, Judge.

[fol. 43] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed May 7, 1935

R. G. Holsing, Receiver of the First National Bank of Boswell, Pennsylvania, avers the following reasons in support of his appeal as Receiver of said Bank to the United States Circuit Court of Appeals for the Third Circuit:

I

The lower Court erred in the opinion filed by Nelson McVicar, Judge of said Court, on the 10th day of January, 1935, wherein the Court said:

"I am of the opinion that the deposit aforesaid was a special deposit; that the assets of the bank were augmented when the bank received from its customer the price agreed upon for said bonds and, therefore, that the plaintiff is entitled to participate in the distribution of the funds of the defendant bank as a preferred creditor."

Exceptions

Exception to defendant granted,

N. McVicar, P. J. (Seal.)

II

The court erred in entering the following final decree:

"Now, January 17th, 1935, it is hereby Ordered, Adjudged and Decreed that the judgment recovered in this Court in these proceedings, wherein the Administrator of Emiline Rauch are plaintiffs and the Receiver of the First National Bank is defendant in the amount of Four Hundred Two and 08/100 — ($402.08) is founded on facts circum-
[fol. 44] stances, having all the attributes of a special deposit and as such special deposit is entitled to participate in the distribution of the assets by the Receiver of the First National Bank of Boswell as a preferred creditor.

By the Court, V.

Exceptions

"Now, 17th day of January 1935, exception granted to the defendant and bill sealed.

Nelson McVicar, D. J. (Seal.)

In United States District Court

Præcipe for Record—Filed March 7, 1935

To the Clerk of the United States District Court for the Above Named District:

Please include in the Record of the above case for review of the same by the Circuit Court of Appeals the following:

Docket Entries in Common Pleas Court of Somerset County and the Docket Entries of the District Court for the Western District of Pennsylvania.

Plaintiff's Statement of Claim.

Petition to remove cause to District Court and Order thereon.

Affidavit of Defense.

Transcript of Proceedings.

[fol. 45] Verdict of the Jury.

Judgment on the Verdict.

Motion for Rule and Answer thereto.

Opinion of the District Court.

Decree of the District Court and exceptions thereto.

and deliver the above record to me at the following address: Clarence L. Shaver, Attorney for R. G. Holsing, Receiver, Appellant, Somerset, Pa.

Clarence L. Shaver.

March 6th, 1935.

In United States District Court

Motion to Amend Record—Filed July 22, 1935

And Now, July 19, 1935, the court is respectfully moved to amend the record in the above case, so that the title of the case shall read: "Henry I. Rauch, Administrator, Emi-

line R. Rauch, late of Jenner Township, Somerset County, Pennsylvania, vs. Park L. Hoffman, substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pennsylvania," said R. G. Holsing having resigned as Receiver and Park L. Hoffman having been appointed in his stead by the Comptroller of the Currency of the United States, as [fol. 46] appears by a certified copy of his appointment which is hereto attached.

Joseph Levy, Attorney for Defendant.

July 22nd, 1935, amendment allowed.

R. M. Gibson, District Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5798

Park L. Hoffman, Substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pa., Appellant,

vs.

Henry I. Rauch, Administrator, Emiline B. Rauch, Appellee

And afterwards, to wit, the 7th day of October, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 9th day of October, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 48] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5798

Park L. Hoffman, Substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pennsylvania, Appellant,

v.

Henry I. Rauch, Administrator, Emiline B. Rauch, Late of Jenner Township, Somerset County, Pennsylvania, Appellee

Appeal from the District Court of the United States for the Western District of Pennsylvania

Opinion—Filed October 9, 1936

Before Buffington, Davis and Thompson, Circuit Judges

Davis, Circuit Judge:

This is an appeal from a judgment of the District Court, holding the bank liable for the purchase price of four bonds

left with the bank "for safe keeping only" under the following circumstances.

On July 10, 1922, Emiline B. Rauch left with the Peoples State Bank of Boswell five United States Liberty Bonds [fol. 49] of the value of $100 each "for safe keeping only" for which the bank gave her a receipt.

On April 9, 1929, with the approval of the Comptroller of the Currency and the Department of Banking of Pennsylvania, the First National Bank of Boswell purchased all the property and assets of every kind of the Peoples State Bank and on the same day the bonds of Mrs. Rauch, along with other property were delivered by the State Bank to the National Bank. Thereafter the National Bank held the same relation to the bonds as had the State Bank.

The last time that Mrs. Rauch saw the bonds was on September 29, 1931. She presumably had gone to the bank from time to time to cut coupons from them.

On January 21, 1932, the cashier of the First National Bank without the consent or even the knowledge of Mrs. Rauch, or her legal representative, sold four of the bonds to Josiah and Rose Lohr, customers and depositors of the bank, and charged their account with the purchase price of $400.24. On the following day the cashier drew his check payable to the order of Post & Flagg, brokers, for $402.08 for the purchase of four similar bonds to take the place of the bonds of Mrs. Rauch which he had sold, but on January 26, 1932, before the check was presented for payment, the bank was found to be insolvent and its business was suspended. Mr. R. G. Holsing was appointed receiver of the bank by the Comptroller of the Currency. He later resigned as receiver and Mr. Park L. Hoffman, appellant, was appointed in his place. The check has never been paid.

Mrs. Rauch died January 2, 1932, nineteen days before the cashier sold the bonds, and this suit was brought by the administrator of her estate to recover the purchase price of the bonds. The case was tried to the court and jury and at its conclusion the court directed a verdict for the plain- [fol. 50] tiff for $402.08. A motion for a new trial was refused. Judgment was entered on the directed verdict and the case is here on appeal from that judgment.

The plaintiff contends that the deposit of these bonds created an express trust and augmented the assets of the bank.

The defendant on the other hand contends that the mere leaving of the bonds with the bank did not create a trust, either express or implied, but if it did, the conversion of the bonds was only a breach of the trust, and when the proceeds of their sale went into, and were commingled with, the general funds of the bank where they could not be traced to any special fund or specifically identified, the owner was not entitled to a preference over the general creditors of the bank; and that, as the transfer of the funds from the account of the purchaser of the bonds to the general fund of the bank was a mere bookkeep' transaction and no money was actually paid in to increase the assets of the bank, the owner in consequence was not entitled to a preference.

The learned District Judge rejected the contention of the receiver of the bank and held that the deposit was a special deposit which augmented the assets of the bank when it received the price of the bonds from its customer and entitled the owner to a preference.

The receiver says that it is necessary for the appellee to establish the following three things before he can recover:

"(1) that the bank received the property in a fiduciary capacity; (2) that the property actually augmented the existing assets, as distinguished from a mere bookkeeping credit; and (3) that the fund is traceable as an identifiable res in the hands of the receiver."

He relies upon the following cases to support his contention: National City Bank v. Hotchkiss, 231 U. S. 50; Schuy-[fol. 51] ler v. Littlefield, 232 U. S. 707; Cunningham, Trustee of Ponzi v. Brown, 265 U. S. 1; St. Louis & San Francisco R. R. Co., et al. v. Spiller, et al., 274 U. S. 304. But these cases when correctly interpreted, do not support his position. In the Hotchkiss case, a loan was made by the bank to a customer and the money was placed to his credit in a general account to be used in taking up certain securities. The bank closed, and it was held that when the funds entered the stream of the bank's general property, it could no longer be identified and the depositor had to share with other general creditors on a pro rata basis. There was here a pure relation of debtor and creditor between the bank and the depositor. In the case of Cunningham, trustee, etc. v. Brown, Ponzi advertised widely for the loan of money and promised to return the money with

large interest at any time the lender desired it. The money thus received was deposited in a bank in a general fund. When this fund was depleted, it was replenished by other money secured in the same way. When the Ponzi bubble burst, certain people who had loaned money to Ponzi tried to get their money from the bank on the ground that they had elected to rescind the contract with Ponzi on the ground of fraud. The court said that they had two remedies which they could have pursued for the recovery of their money: They could have followed the money wherever they could trace it and could have asserted the right of possession to it on the ground of a resulting trust in their favor, or they could have established a lien for what was due them in any particular fund of which he had made it a part. They did not do either and consequently failed. The receiver further cited Jennings v. United States Fidelity & Guaranty Co., 294 U. S. 216; Old Company's Lehigh v. Meeker, 294 U. S. 227; Adams v. Champion, 294 U. S. 231 and many others, but in all of them there existed the [fol. 52] relation of debtor and creditor between the bank and the depositor which distinguishes them from the case at bar.

Mrs. Rauch simply left the bonds with the bank "for safe keeping only". The bank was the mere custodian of the bonds, and title to them never passed to the bank. Mrs. Rauch or the administrator of her estate had the right to follow them in the original, or in some other substituted form. The right of the administrator to pursue the bonds or the money into which they had been converted into the hands of the receiver of the bank, depends upon the fact that title to the bonds or the money representing them was in the administrator and not upon the relation of debtor and creditor, or upon the ground of a debt due and owing, Cox v. St. Anthony Bank & T. Co., 41 Idaho, 776; Windstanley v. Second Nat. Bank, 13 Ind. App. 544; Andrew v. State Bank, 205 Iowa, 1064, or of compensation for the loss of property, Myers v. Matusek, 98 Fla. 1126; Daughtry v. International Bank, 18 N. M. 119, or on the ground of unlawful conversion of property, Hanover Nat. Bank v. Thomas, 217 Ala. 494; Holbrook Irrig. Dist. v. First State Bank, 84 Colo. 157. Title never passed to the bank. The administrator is merely seeking to recover his own property or the proceeds thereof and it is the duty of the court to lend its aid to the owner in reclaiming his prop-

erty. Macy v. Roedenbeck, 227 Fed. 346, 353, 356. In that case Judge Elliott, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"Under the earlier rule petitioner would have been required to identify it (the property in question) as the very property which he had confided to another. The modern and more equitable doctrine permits the recovery of a trust fund from one not an innocent purchaser, and into any shape into which it may have been transmuted, provided [fol. 53] he can establish the fact that it is his property, or the proceeds of his property, or that his property has gone into it and remains in a mass from which it cannot be distinguished. Spokane County v. First National Bank of Spokane et al., 68 Fed. 979, 982.

"This more recent doctrine follows the rule announced in Re Hallett's Estate (Knatchbull v. Hallett) 13 Ch. Div. 696, which is to the effect that, if money held by one in a fiduciary character has been paid by him to his account at his bank, the person for whom he held the money can follow it and has a charge on the balance in the banker's hands, and that if the depositor has commingled it with his own funds in the bank, and afterwards drawn out sums upon checks in the ordinary manner, he must be held to have drawn out his money in preference to the trust money, and if he destroyed the trust fund by dissipating it altogether, there remains nothing to be the subject of the trust; that only so long as the trust property can be traced and followed into other property into which it has been converted, does it remain subject to the trust."

Judge Elliott cited many cases, both federal and state, sustaining this doctrine. There is no question about the facts in this case nor about the fact that the bonds were sold and that the proceeds went into the funds of the bank where they still remain in the possession of the receiver.

With the District Judge, we think that the proceeds of these bonds augmented the assets of the bank. They certainly reduced its liability to others.

The administrator is entitled to recover them and the judgment of the District Court is affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 54] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5798

Park L. Hoffman, Substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pa., Appellant,

vs.

Henry I. Rauch, Admr., etc., Appellee

On Appeal from the District Court of the United States, for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, October 9, 1936.

J. Warren Davis, Circuit Judge.

Endorsements: Order Affirming Judgment. Received & Filed Oct. 9, 1936. Wm. P. Rowland, Clerk.

[fol. 55] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Park L. Hoffman, Substituted for R. G. Holsing, Receiver of 1st National Bank of Boswell, Pa., Appellant, vs. Henry I. Rauch, Administrator, Emiline B. Rauch, etc., Appellee, No. 5798 on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 17th day of November, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 56] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter George P. Barse. File No. 41,103. U. S. Circuit Court of Appeals, Third Circuit. Term No. 563. Park L. Hoffman, Substituted for R. G. Holsing, Receiver of First National Bank of Boswell, Pennsylvania, petitioner, vs. Henry I. Rauch, Administrator, Emiline B. Rauch, Late of Jenner Township, Somerset County, Pennsylvania. Petition for a writ of certiorari and exhibit thereto. Filed December 8, 1936. Term No. 563, O. T., 1936.